



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### MEMORANDUM

To: ACUS Assembly  
From: Matthew L. Wiener (Acting Chairman), Reeve T. Bull (Research Director), and Jeremy S. Graboyes (Director of Public and Interagency Programs)  
Date: December 10, 2021  
Subject: 76th Plenary Session: Discussion of Possible Future ACUS Projects and Reforms to the Congressional Review Act

---

We look forward to seeing all of you at the 76th Plenary Session on Thursday, December 16. We have scheduled a 30-minute, optional discussion at 5:00 p.m. during which members can offer suggestions for new projects, including future studies that would result in recommendations as well as ACUS sourcebooks, guides, forums, and other initiatives. We have also scheduled a 15-minute discussion of possible projects relating to the Congressional Review Act to follow consideration of *Technical Reform of the Congressional Review Act*.

This memorandum lists ideas that have arisen in conversations with ACUS members and others interested in our work. Although we are especially interested in your thoughts on these project ideas, discussion is not limited to these topics, and we welcome all suggestions.

#### **Discussion of Future Projects on Congressional Review Act [2:15 p.m.]**

Questions raised during the Rulemaking Committee's project discussions included:

1. Should Congress amend the CRA's definition of "rule"?
2. Should Congress amend the CRA to define "substantially similar" and/or provide a statement of reasons for disapproval that will dictate whether a subsequent rule is "substantially similar"?
3. Should Congress amend the CRA to provide for severance and disapproval of only a part of a rule?

#### **Discussion of Possible Future ACUS Projects [5:00 p.m.]**

##### *Enhancing Public Engagement in Regulatory Policymaking*

Two recent ACUS forums, *Underserved Communities and the Regulatory Process* and *Enhancing Public Input in Agency Rulemaking*, considered different ways to ensure the public, including traditionally underserved communities, can participate meaningfully in regulatory policymaking. We would especially like to hear from the membership about recommendation projects ACUS might undertake (e.g., using virtual platforms to allow remote public participation in meetings, establishing engagement offices) relating to the subject of the forums.

### *Reducing Administrative Burdens*

A related topic discussed during the first forum was the issue of “sludge,” to use the term coined by Cass Sunstein in his recent book on the topic. Overly time-consuming or confusing paperwork and procedures can complicate regulatory compliance and prevent parties from applying for benefits and accessing services. A possible project might look at “sludge audits” or other approaches to reducing unnecessary administrative burdens in regulatory processes.

### *Judicial Review*

The Judicial Review Committee recently discussed possible topics for study drawn from Recommendation 2021-5, including:

1. Choice of court (i.e., district court or court of appeals) for judicial review of agency action. This project would involve revisiting [ACUS Recommendation 75-3](#).
2. Possible recommendations to Congress or agencies on issue exhaustion requirements in adjudication or rulemaking. This project would build on [ACUS Statement # 19](#).

During the Judicial Review Committee’s meeting, the Committee reached a consensus that ACUS should undertake a project addressing two issues: (a) when a claim challenging agency action accrues and (b) “the extent to which judicial review remains available after the expiration of a time period specified in a special statute authorizing pre-enforcement review of agency rules” (Recommendation 2021-5, p. 2 n. 7).

### *Regulatory Enforcement*

For some time, the Office of the Chairman has been considering possible projects relating to regulatory enforcement. One recently launched project of which you are already aware is *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*, which an ACUS committee will consider in 2022. Other ideas for possible projects that have arisen in discussions with members and others include:

1. Examining how regulatory agencies use, develop, and provide public access to enforcement manuals and other guidance documents.
2. Examining how agencies collect, use, and make publicly available data relating to enforcement activities.
3. Examining procedures and processes that agencies use before initiating an enforcement action (through the issuance of a complaint or otherwise), including those relating to the submission and evaluation of evidence and legal positions.

### *Freedom of Information Act*

The Office of the Chairman is considering potential projects involving statutory or administrative reforms to improve adjudication of Freedom of Information Act (FOIA) requests and establish alternatives to FOIA for public access to information.